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NO. 87-2051

In The

Supreme Court Of The United States

OCTOBER TERM, 1987

MJR, INC., *et al*,
Petitioners,

vs.

THE CITY OF DALLAS, TEXAS, *et al*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Can a content-neutral ordinance regulating sexually oriented businesses temporarily deny a license to persons recently convicted of specified sex-related crimes?

2. Does *Young v. American Mini-Theatres* require an ordinance regulating the location of sexually oriented businesses to contain a "grandfather clause," thereby exempting existing businesses from its locational restrictions?

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NO. 87-2071

In The

Supreme Court Of The United States

OCTOBER TERM, 1987

MJR, INC., *et al*,

Petitioners,

vs.

THE CITY OF DALLAS, TEXAS, *et al*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Petitioners' statement of the case substantially and materially misrepresents the facts of this case. Petitioners have stated as matters of fact, without citation to the record, numerous unproven allegations for which there are no findings by the trial court. Among these are the allegations that adult cabarets in Dallas have caused no deleterious effects on neighborhoods (Pet. at 3); the Dallas Ordinance will force every adult cabaret in Dallas to close (Pet. at 4 and 25); and that the areas to which the cabarets may relocate under the Ordinance are industrial zones, poorly lit, with high crime rates, which effectively sentence the cabarets to an "economic death." (Pet. at 5). Petitioners in a number of

instances have misrepresented the findings of the District Court and have injected new facts not in the record.[1]

Respondents will not engage in a point-by-point debate with Petitioners in this matter. Instead, Respondents refer the Court to the history of the case as set forth in the lower court opinions[2] and supplement same with the following statement of the case.

After considering the studies of other metropolitan cities on the effects of sexually oriented businesses upon neighborhoods, as well as its own crime rate study, the City of Dallas enacted a Sexually Oriented Business Ordinance, codified as Chapter 41A of the Dallas City Code. The ordinance regulates sexually oriented businesses in two basic ways: zoning restrictions and a license requirement.

The zoning provisions prohibit such businesses from locating within 1000 feet of a church, school, residential area, public park adjacent to a residential area, or another sexually oriented business. Businesses located within 1000 feet of one of the prohibited areas are given a three-year amortization period if they were already operating on the effective date of the Ordinance. Section 41A-13, Dallas City Code.

The licensing provisions require a license to be obtained by those establishments meeting the Ordinance's definition of a "sexually oriented business." Sections 41A-4 and 41A-2, Dallas City Code. A license is not available to persons recently convicted of certain sex-related crimes. However, an individual convicted of those crimes may again become eligible for a license two years after the date of conviction or

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[1]See for example, Pet. at 29, nn. 20-22.

[2]*Dumas v. City of Dallas*, 648 F.Supp. 1061 (N.D. Tex. 1986), and *FW/PBS v. City of Dallas*, 837 F.2d 1298 (5th Cir. 1988).

end of confinement, whichever is later. In the case of convictions for felonies or multiple misdemeanors, the waiting period is five years. Section 41A-5, Dallas City Code.

Immediately after passage of the Ordinance, a variety of adult entertainment establishments attacked its constitutionality in three separate federal suits, one of which was brought by Petitioners. Petitioners in this case are a group of topless bars, classified by the Ordinance as "adult cabarets." Each of the suits sought declaratory and injunctive relief. The suits were consolidated, and the case was submitted for decision on cross-motions for summary judgment filed by all parties. No party objected to resolution of the issues by summary judgment.[3]

The District Court upheld the constitutionality of the Ordinance, with the exception of four relatively minor provisions dealing with licensing. These sections were later amended or deleted to comport with the Court's ruling.[4]

The District Court made a number of findings which are pertinent to this Petition for Certiorari. First, the Court found that the Ordinance was content-neutral, focusing on the secondary effects of sexually oriented businesses and having only an incidental impact on protected speech, and that it satisfied the four-part test of *United States v. O'Brien*, 391 U.S. 367 (1968). Second, the Court found that the land available for the relocation of existing businesses and the establishment of new businesses was substantial, constituting 8-10% of the City's total area.[5] The Court

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[3]See *FW/PBS v. City of Dallas*, 837 F.2d 1298, 1303 (5th Cir. 1988), and *Dumas v. City of Dallas*, 648 F.Supp. 1061, 1064 n. 5, and 1068 n. 17 (N.D. Tex. 1986).

[4]See Ordinance 19377, enacted October 12, 1986, included herein as Appendix A.

[5]*Dumas v. City of Dallas*, 648 F.Supp. 1061, 1070-71 (N.D. Tex. 1986). Petitioners inaccurately state that the District Court found "slightly more than 8%" of the City to be available. Pet. at 25.

further found that the Ordinance's three-year amortization period was generous and constituted ". . . a valid mechanism used to enforce valid locational regulations."[6]

Regarding the licensing provisions, the District Court found that the requirement of a license for sexually oriented businesses is constitutional, and that the denial of licenses to persons convicted of specified sex-related crimes is reasonably related to the crime-control intent of the Ordinance[7] and is consistent with *Arcara v. Cloud Books, Inc.*, 478 U.S. _____, 106 S.Ct. 3175 (1986). Last, the Court held that the Ordinance provides procedural due process of law and satisfies the standard of *Freedman v. Maryland*, 380 U.S. 51 (1965).

The Fifth Circuit upheld the District Court decision in all respects. The Court disagreed, however, that a content-neutral regulation such as the Dallas Ordinance must meet the *Freedman* standard of due process. Instead, the Court found that the Ordinance, being content-neutral, need only meet the standards applicable to time, place, and manner regulations and that it did so.[8]

The Fifth Circuit agreed that the Ordinance's use of criminal convictions to deny licensing for a limited period of time is constitutional. The Court found that ineligibility results only from the recent commission of sex-related crimes and that the City had demonstrated a substantial relationship between the conviction and the evil to be regulated. The Court stated additionally that the Ordinance in this regard might well meet a strict scrutiny test as well as a substantial relationship test.[9]

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[6] *Id.* at 1071.

[7] *Id.* at 1071, 1073-74.

[8] *FW/PBS v. City of Dallas*, 837 F.2d 1298, 1301-1303 (5th Cir. 1988).

[9] *Id.* at 1304-1305.

Finally, the Court held that the District Court had before it sufficient evidence to conclude that the Ordinance allows adequate alternative sites for the relocation of sexually oriented businesses.[10]

ARGUMENTS SUPPORTING DENIAL OF THE WRIT

I. THE REGULATORY PROVISIONS OF THE ORDINANCE ARE CONSISTENT WITH PRIOR DECISIONS OF THIS COURT.

A. The Fifth Circuit and District Court Correctly Held That Temporary Denial of a Sexually Oriented Business License to Persons Recently Convicted of Specified Sex-Related Crimes Does Not Violate the Constitution and is Consistent with This Court's Decisions in *Arcara v. Cloud Books, Inc.* and *City of Renton v. Playtime Theatres, Inc.*

Petitioners assert that the provisions of the Ordinance allowing denial of a license to a person with certain specified convictions act as a prior restraint on expression. This contention was correctly rejected by both the Fifth Circuit[11] and the District Court.[12]

In *City of Renton v. Playtime Theatres, Inc.*,[13] this Court faced a zoning ordinance similar to the Dallas ordinance. The Court in upholding the *Renton* ordinance tested the ordinance under the time, place, or manner analysis reserved for content-neutral regulations, even though the Ordinance clearly marked businesses according to the content of their products.

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[10] *Id.* at 1303.

[11] *FW/PBS v. City of Dallas*, 837 F.2d at 1304-05.

[12] *Dumas v. City of Dallas*, 648 F.Supp. at 1073-74.

[13] 475 U.S. 41 (1986).

This Court gave two reasons for applying the time, place, or manner analysis. First, the ordinance could be treated as content-neutral because its purpose was not to suppress speech of a particular content, but to control the *effects* of certain businesses on the urban environment. As long as the City's predominant concern was to curb the secondary effects of adult businesses on neighborhoods, the ordinance could distinguish between types of businesses without engaging in content-based regulation.

Second, this Court affirmed that sexually oriented materials are entitled to less First Amendment protection than other forms of protected expression. The plurality opinion in *Young v. American Mini-Theatres* had stated this idea in recognizing that "society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate . . ." *City of Renton*, 106 S.Ct. at 929-30, quoting *Young*, 427 U.S. at 70.

The Fifth Circuit recognized that this reasoning applies with equal force to the Dallas ordinance. The type of activity regulated is the same as in *City of Renton*, and there was abundant evidence that the predominant concern of the Dallas City Council in enacting the Ordinance was to limit the secondary effects of sexually oriented businesses and not the content of their products.

Accordingly, the Fifth Circuit held that as a content-neutral regulation, the Dallas Ordinance — *including* the details of its *licensing* scheme — should be judged under a "time, place, and manner" analysis in accordance with *Young v. American Mini-Theatres* and *City of Renton*. As the Court noted, the "time, place, and manner" standard cannot be limited solely to regulation of "place." Therefore, the regulations of the Ordinance are constitutional if they are

narrowly tailored to serve a substantial governmental interest while leaving open alternative channels of communication.[14]

Use of Criminal Convictions

The Dallas ordinance, including its criminal convictions disability, clearly meets this test. First, by limiting the disability to specified crimes that are sexual in nature, the Ordinance exhibits a substantial relationship between the conviction on which denial is based and the evil sought to be prevented. Indeed, the Fifth Circuit found that the Ordinance might well meet a strict scrutiny standard as well as the substantial relationship test. *FW/PBS v. City of Dallas*, 837 F.2d at 1304-05. The City Council's objective in enacting the Ordinance was to ameliorate the effects of sexually oriented businesses on neighborhoods — including the prevention of *crime*. By its use of sex-related crimes as an occupational disability, the Ordinance is "narrowly tailored to avoid licensure of those who have recently shown a predilection toward the criminal conduct the Ordinance was designed to overcome."[15]

Second, Petitioners overlook the importance of this Court's ruling in *Arcara v. Cloud Books, Inc.*, 478 U.S.___, 106 S.Ct. 3175, 92 L.Ed.2d 568 (1986). In *Arcara*, this Court upheld a New York law permitting closure of a sexually oriented bookstore for one year because of acts of prostitution and public lewdness occurring on the premises with the knowledge of management. As in *Arcara*, the crimes listed in the Dallas Ordinance as a basis for denying licensure (prostitution, public lewdness, sexual assault, etc.) manifest "no element of protected expression" under the First

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[14] *SDJ, Inc. v City of Houston*, 837 F.2d 1268, 1273 (5th Cir. 1988).

[15] *Dumas v. City of Dallas*, 648 F.Supp. at 1074 n. 34.

Amendment. *Arcara*, 106 S.Ct. at 3176-77. As such, they may be used to deny licensure.[16] If criminal conduct will permit closure of an adult business, it follows that one who has recently been convicted of a sex-related crime may for a time be denied a license to operate a sexually oriented business.[17]

Additionally, it must be stressed that the Dallas ordinance permits the licensing of former offenders after the passage of a specified amount of time.[18] For example, a person convicted of Promotion of Obscenity, a misdemeanor under Texas law,[19] may receive a license two years after his date of conviction or end of confinement, whichever is later, under the terms of the Ordinance. Just as the New York law in *Arcara* permitted the closure of a business for one year based upon criminal conduct, the Dallas ordinance withholds licensing for certain sex-related offenses for a limited period of time. The Dallas ordinance is consistent with *Arcara*.

Petitioners cite *Near v. Minnesota*, 283 U.S. 697 (1931), as conflicting with the Fifth Circuit decision in this case. In *Near* the challenged regulation permitted the state to permanently enjoin the publication of any newspaper believed to be publishing "obscene, lewd, lascivious, malicious, scandalous, or defamatory" material. The statute required no prior judicial determination of these issues. The law was clearly content-based and constituted a permanent

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[16]The crime of Obscenity also involves no protected expression under the First Amendment. *Roth v. United States*, 354 U.S. 476 (1957); *Miller v. California*, 413 U.S. 15 (1973).

[17]*Dumas v. City of Dallas*, 648 F.Supp. at 1074 n. 34.

[18]Section 41A-5(c), as amended by Ordinance 19377, Appendix A of this Brief.

[19]Section 43.23, Texas Penal Code.

suppression of speech. *Contra*, the Dallas Ordinance is content-neutral, and its denial of a sexually oriented business license to those convicted of sexually oriented crimes is but a temporary occupational disability. It does not bar the exhibition of any particular film or book, and it is not directed at future expression, unlike the cases cited by Petitioners. It merely acts as a short-term disability of particular persons to enter into or continue in an occupation heavily regulated by government. As Judge Higginbotham noted in his opinion for the Fifth Circuit, it is an accepted principle of the police power that "the government may attach to criminal convictions disabilities aimed at preventing recidivism." *FW/PBS v. City of Dallas*, 837 F.2d at 1305, citing *inter alia DeVeau v. Braisted*, 363 U.S. 144, 155-59 (1960) (plurality opinion) ("Barring convicted felons from certain employments is a familiar legislative device to insure against corruption in specified, vital areas").

The other cases cited by Petitioners are pre-*Arcara* cases involving content-based regulations directed specifically toward the exhibition of protected materials — unlike the *content-neutral* Dallas Ordinance — and, as such, are either inapplicable or distinguishable.[20]

In addition to this Court's ruling in *Arcara*, numerous lower court decisions have upheld the use of rationally-related criminal convictions to deny or revoke sexually oriented business occupational licenses, including two cases

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[20]For example, Petitioners cite *City of Paducah v. Investment Entertainment*, 791 F.2d 463 (6th Cir. 1986), *cert. denied* 107 S.Ct. 316 (1986). In that case a license could be revoked upon the administrative finding of a Board that an allegedly obscene film had been shown. *Contra*, the Dallas Ordinance requires a judicial finding of obscenity through its requirement of a court conviction.

in which this Court denied certiorari.[21] The Ordinance's limited use of criminal convictions is narrowly tailored to further a substantial governmental interest and is consistent with this Court's rulings in *Arcara* and *City of Renton*.

B. The Lower Courts' Rulings That Sexually Oriented Businesses May Be Subject to a License Requirement is Consistent with *Young v. American Mini-Theatres* and *City of Renton*.

In *City of Renton, supra*, this Court held that content-neutral ordinances having an incidental impact on free expression may be analyzed under a time, place, and manner standard of review.[22] The Fifth Circuit in the instant case accordingly applied this standard of review and found that the regulatory provisions of the Ordinance are reasonable and are not unduly burdensome under the First Amendment.

In *Young v. American Mini-Theatres, supra*, this Court noted that even in the area of protected expression, a difference in content may invoke a different governmental response.[23] Although the impetus for a law may be the type of content communicated by targeted businesses, the government may permissibly tailor its reaction to different

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[21] *106 Forsyth Corp. v. Bishop*, 482 F.2d 280 (5th Cir. 1973), *cert. denied* 422 U.S. 1044 (1975); *Airport Bookstore, Inc. v. Jackson*, 248 S.E.2d 623 (Ga. 1978), *cert. denied sub nom. Gateway Books v. Jackson*, 441 U.S. 952 (1979).

For similar decisions see *Chulchian v. City of Indianapolis*, 633 F.2d 27 (7th Cir. 1980); *Broadway Books v. Roberts*, 642 F.Supp. 486 (E.D. Tenn. 1986); *Borrago v. City of Louisville*, 456 F.Supp. 30, 32 (W.D. Ky. 1978); *West Gallery Corp. v. Salt Lake City Board of Commissioners*, 586 P.2d 429 (Utah 1978).

[22] *City of Renton v. Playtime Theatres, Inc.*, 106 S.Ct. at 927.

[23] *Young v. American Mini-Theatres*, 427 U.S. at 66.

messages according to the degree to which its interests are implicated. *Young*, 427 U.S. at 82 n. 6 (1976) (Powell, J., concurring).

Accordingly, the Dallas Ordinance has imposed reasonable time, place, and manner regulations which, although directed at businesses of a particular nature (some but not all of which engage in First Amendment activities), constitute a legitimate governmental response to the problems generated by such businesses.

Petitioners challenge the City's authority to impose a licensing requirement. The concept of licensing sexually oriented businesses, including adult cabarets, has been upheld against First Amendment and prior restraint challenges.[24] Indeed, this Court in *Young* upheld a Detroit ordinance which included adult cabarets among the "regulated uses" subject to licensing and zoning regulations. *Young v. American Mini-Theatres, Inc.*, 427 U.S. at 52 n.3 (1976). Licensing is a valid method of identifying sexually oriented businesses and ensuring that they abide by the locational and other restrictions of the City's ordinance.[25] Topless bars may be as subject to licensing as theaters and other types of businesses. *SDJ, Inc. v. City of Houston*, 636 F.Supp. 1359 (S.D. Tex. 1986), affirmed at 837 F.2d 1268 (5th Cir. 1988).

The fact that an ordinance applies to businesses of a particular type does not make it a content-based regulation, as this Court so stated in *Young* and *City of Renton*. The Dallas Ordinance is a valid legislative decision by the Dallas

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[24] *Walt Distributors, Inc. v. City of Newport News*, 782 F.2d 1165, 1171 (4th Cir. 1986); *FW/PBS v. City of Dallas, supra*; *SDJ, Inc. v. City of Houston*, 837 F.2d 1268 (5th Cir. 1988); *Genusa v. City of Peoria*, 619 F.2d 1203 (7th Cir. 1980).

[25] *Genusa v. City of Peoria*, 619 F.2d 1203, 1212 (7th Cir. 1980); *Dumas v. City of Dallas*, 648 F.Supp. at 1071 n.26 (N.D. Tex. 1986).

City Council to treat sexually oriented businesses differently because they have "markedly different effects upon their surroundings." *Young*, 427 U.S. at 82 n.6 (Powell, J., concurring). The Dallas licensing regulations are reasonable under the time, place, and manner test and are not in conflict with any decision of this Court.

C. The Fifth Circuit and District Court Correctly Held That the Ordinance Provides Adequate Procedural Safeguards and is Consistent With the Decisions of This Court.

Both the District Court and Fifth Circuit found that the Ordinance provides adequate procedural safeguards which prevent the licensing requirements from acting as a prior restraint on speech. Petitioners, however, persist in the argument that the Ordinance constitutes a prior restraint.

Petitioners assert that the Ordinance is governed by and fails to meet the standards of *Freedman v. Maryland*, 380 U.S. 51 (1965). However, as was held by the Fifth Circuit, the *Freedman* standard is inapplicable to a content-neutral regulation such as the Dallas ordinance.[36] The Court noted that after the *City of Renton* decision, a content-neutral ordinance which regulates the *effects* of sexually oriented businesses without engaging in content-based regulation ". . . need only meet the standards applicable to time, place, and manner restrictions and need not comply with *Freedman's* more stringent limits on regulations aimed at content." *FW/PBS v. City of Dallas*, 837 F.2d at 1306.

And as the Fifth Circuit correctly pointed out, the First Amendment protection required for political or religious activities, such as those involved in *Fernandes v. Limmer*,[37]

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[36]*Accord, Bayside Enterprises, Inc. v. Carson*, 470 F.Supp. 1140, 1149 (M.D. Fla. 1979).

[37]663 F.2d 619 (5th Cir. 1981), *cert. dismissed* 458 U.S. 1224 (1982).

"... is of a different order than the protection due sexually oriented businesses. * * * What is being limited here is not a particular movie — as in *Freedman* — nor episodic solicitation efforts — as in *Fernandes* — but a long-term commercial business." *FW/PBS v. City of Dallas, id.* at 1303.

The cases cited by Petitioners in support of their *Freedman* argument are easily distinguishable. Each of them involves content-based regulations involving a direct impact on the suppression of speech. The regulations involved in *City of Paducah v. Investment Entertainment*[28] and *Entertainment Concepts, Inc. v. Maciejewski*[29] were local obscenity ordinances which called upon a city board to review particular films and make administrative findings of obscenity. In *Freedman v. Maryland*, the Maryland statute at issue actually required the films themselves to be licensed and directed the Board of Censors to deny licensure to films deemed to be "obscene, or such as tend, in the judgment of the Board, to debase or corrupt morals . . ." *Freedman v. Maryland*, 380 U.S. 51, 52 n. 2 (1965). The Dallas Ordinance, as stated, is a content-neutral regulation directed at curbing secondary effects and not the content of expression itself.

It should be remembered that even if this Court believes that the *Freedman* standard applies to the Dallas ordinance, the District Court below found that *Freedman* was satisfied,[30] holding that

> "The appeal, revocation, and suspension provisions are replete with procedural protections and reviewable

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[28] 791 F.2d 463 (6th Cir. 1986), *cert. denied* 93 L.Ed.2d 290 (1986).

[29] 631 F.2nd 497 (7th Cr. 1980), *cert. denied* 40 U.S. 919 (1981).

[30] As the District Court noted, 648 F.Supp. at 1075, prompt judicial review of an adverse licensing decision is available to any party in addition to the Ordinance's administrative appeal procedures. Restraining orders (Chapter 65, TEX.CIV.PRAC. & REM. CODE) and writs of mandamus are among the remedies available under Texas law.

standards, and comport with *Freedman* and fundamental tenets of due process." *Dumas v. City of Dallas*, 648 F.Supp. at 1075.

II. THE ZONING PROVISIONS OF THE ORDINANCE ARE GOVERNED SQUARELY BY *CITY OF RENTON*.

A. Petitioners' Arguments Concerning The Adequacy of Alternative Sites Are In Reality Arguments of Economic Desirability, an Issue Squarely Controlled by *City of Renton*.

Section 41A-13 of the Ordinance prohibits sexually oriented businesses from locating within 1000 feet of churches, schools, residential areas, parks adjacent to residential areas, and other sexually oriented businesses. Businesses existing prior to the enactment of the Ordinance which violate the location restrictions are declared nonconforming uses and are given three years in which to relocate.[31]

Before enacting the Ordinance, both the Planning Commission and the Dallas City Council separately found, based upon the evidence presented to them, that the Ordinance provides adequate alternative sites for relocation. The District Court gave deference to the City Council findings (TR. at 154) but also found them to be fully supported by the evidence presented upon cross-motions for summary judgment by both Plaintiffs and Defendants. See City's Exhibit Nos. 15 and 27 and Plaintiff's Exhibit Nos. 1, 3, 4, and 7 referred to in *Dumas v. City of Dallas*, 648 F.Supp. at 1071.

Petitioners insist that the District Court failed to adequately assess the impact of the Ordinance on cabarets, and that the Ordinance fails to leave sufficient locations for

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[31]Section 41A-13, Dallas City Code.

existing businesses. This conclusion is unsupported by the record.

The District Court fully considered the evidence and arguments of Petitioners and found them, at best, to speak only to economic desirability. See *Dumas v. City of Dallas*, 648 F.Supp. at 1071, nn. 23-24. In his oral remarks accompanying the release of the written opinion, the District Court stated as follows:

> ... basically the arguments that the ... Plaintiffs are making, like those which are understandably made in other cases involving sexually oriented business ordinances, are that the sites are not desirable for business locations, that they're not economic. And I would reach that conclusion even though arguments made yesterday, and in the briefs, are phrased in terms of impossibility to operate. And I still think all — regardless of the terms used or the rubric used, that the basic difference between the City's evidence and that of the [Plaintiffs] is *whether the locations would be desirable, whether they would be economic*. TR. at 155 (emphasis added).

This Court held in *City of Renton* that the test of an ordinance of this type is not whether it provides sites which are commercially attractive, but whether it permits a "reasonable opportunity" for affected businesses to locate within the City. *City of Renton*, 106 S.Ct. at 932. The District Court in the instant case found that the Ordinance did so.

As stated previously, the case was submitted for decision, without objection, upon cross-motions for summary judgment and the record made in support thereof.[31] The District Court found that approximately *eight to ten* percent of the city's total area (21,000 acres) was available for the location

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[31] *See FW/PBS v. City of Dallas*, 837 F.2d at 1303, and *Dumas v. City of Dallas*, 648 F.Supp. at 1064 n. 5, and 1068 n. 17.

of sexually oriented businesses;[33] that the available areas stretched from the inner city area to the north and south suburbs; and that the alternative sites were feasible locations for such businesses.[34] The Court concluded that the Ordinance permits "reasonable alternative avenues of communication" and satisfies *Basiardanes v. City of Galveston*[35] and *City of Renton*. The Fifth Circuit held that the District Court had evidence before it sufficient to sustain its findings.[36]

It is evident that in making its findings the District Court considered all of the evidence and found that the City's evidence proved that adequate alternative sites exist as a matter of law and that Petitioners' evidence spoke only to economic desirability of the available areas. Petitioners did not move to re-open the evidence following this adverse decision. The record supports the findings of the District Court, and Petitioners are bound by that record. Petitioners may not now ask this Court to disregard an evidentiary issue which was resolved against them by the trial court. The case is squarely controlled by *City of Renton*.

B. Locational Restrictions May Constitutionally Be Applied to Existing Sexually Oriented Businesses When a Reasonable Amortization Period is Provided.

Petitioners seem to suggest that because the Detroit ordinance in *Young v. American Mini-Theatres* applied only to the location of future businesses, it created a constitutional right to a grandfather clause in all sexually oriented business ordinances. Petitioners have missed the point of *Young* In *Young* the pivotal issue was not whether one or more

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[33]Compare *City of Renton, supra* (five percent).

[34]*Dumas v. City of Dallas*, 648 F.Supp. at 1070-71.

[35]682 F.2d 1203 (5th Cir. 1982).

[36]*FW/PBS v. City of Dallas*, 837 F.2d at 1303.

existing businesses would have to move, but whether the ordinance as enacted would have the effect of greatly restricting the public access to protected materials. *Young* created no constitutional right of a business to remain at a location for as long as it chooses; it merely protected the access of the public to sexual materials protected by the First Amendment.

Although the Dallas Ordinance does not grandfather non-conforming uses, it does provide them with a three-year amortization period[37] and an exemption procedure.[38] Such amortization provisions have uniformly been upheld, and the three-year period allowed by the City of Dallas is unusually generous.[39]

In asserting that an ordinance may not require the relocation of existing sexually oriented businesses, Petitioners cite *Adultworld Bookstore v. City of Fresno*, 738 F.2d 1348 (9th Cir. 1985), wherein the Ninth Circuit stated:

> There are apparently no appellate cases since *Young v. American Mini-Theatres, Inc.*, 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976), which have upheld the constitutionality of an ordinance which requires the relocation of existing adult-type businesses. 758 F.2d 1348, 1351.

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[37]Section 41A-13(f), Dallas City Code.

[38]The exemption provision (Section 41A-14) permits applicants whose licenses were denied for zoning reasons to apply for an exemption from the locational restrictions. *See Young v. American Mini-Theatres*, 427 U.S. at 54 n. 7, and 56 (1976).

[39]*See Hart Bookstores v. Edmisten*, 612 F.2d 821, 830 (4th Cir. 1979), *cert. denied* 447 U.S. 929 (1980) (upholding six-month amortization period); *Northend Cinema, Inc. v. Seattle*, 585 P.2d 1159, 1160 (Wash. 1970), *cert. denied sub nom. Apple Theatre v. Seattle*, 441 U.S. 946 (1970) (upholding three-month amortization period).

See also *SDJ, Inc. v. City of Houston*, 636 F.Supp. 1359, 1370-71 (S.D. Tex. 1986), affirmed at 837 F.2d 1268 (5th Cir. 1988) (six-month amortization period); and Note, *Using Constitutional Zoning to Neutralize Adult Entertainment - Detroit to New York*, 5 Fordham Urban L.J. 455, 472-74 (1977) (advocating one-year amortization period).

Respondents respectfully submit that the Ninth Circuit was incorrect. At the time the above statement was made, at least two such appellate cases after *Young* had been decided, and this Court denied certiorari in both.

In *Hart Book Stores v. Edmisten*, 612 F.2d 812 (4th Cir. 1979), the Fourth Circuit upheld a North Carolina statute with a six-month amortization period. This Court denied certiorari at 447 U.S. 929 (1980). And in *Northend Cinema v. City of Seattle*, 585 P.2d 1153 (Wash. 1978), a Seattle ordinance was upheld with a 90-day amortization period. Certiorari was denied *sub nom. Apple Theatre v. City of Seattle* at 441 U.S. 946 (1979).

The use of an amortization provision is a reasonable alternative to a grandfather clause, *SDJ, Inc. v. City of Houston*, 636 F.Supp. at 1370-71 (S.D. Tex. 1986), affirmed at 837 F.2d 1268 (5th Cir. 1988), and is but another application of traditional zoning principles to adult businesses. In *City of Renton*, this Court noted that cities may vary in the methods chosen to further the substantial interest in regulating these businesses. *City of Renton*, 89 L.Ed.2d at 41. While Detroit dispersed adult businesses, the City of Renton concentrated them. Similarly, while Detroit grandfathered existing businesses, the City of Dallas may choose to amortize them and require them to relocate within a reasonable period. So long as the Ordinance does not "unreasonably limit alternative avenues of communication," *Young* is satisfied.

C. A City May Rely Upon the Experience of Other Cities in Dealing With the Secondary Effects of Adult Cabarets, A Principle Clearly Decided in *City of Renton*.

Petitioners ask this Court to rule that a city, in enacting an ordinance regulating existing sexually oriented businesses, "[m]ust demonstrate that the business is causing, or contributing to, adverse secondary effects." Pet. at 25. Thus, Petitioners would hold that before a city may act to ameliorate the secondary effects of adult businesses, it must not only conduct its own independent study, it must conduct *separate* studies for *each* affected business to show how each business is contributing to the secondary effects.

Petitioners' argument is controlled squarely by *City of Renton*. This Court rejected the notion that a city must conduct its own studies before enacting an ordinance, stating:

> The First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies on is *reasonably believed to be relevant* to the problem that the city addresses. *City of Renton v. Playtime Theatres, Inc.*, 106 S.Ct. 925, 89 L.Ed.2d at 40 (1986) (emphasis added).

Petitioners would deny the City the right to rely upon the experience and studies of other cities, in contravention of *City of Renton*, and would require the City to "await deterioration in order to act." *Genusa v. City of Peoria*, 619 F.2d 1203, 1211 (7th Cir. 1980).

Petitioners' complaint that the City Council of Dallas relied upon insufficient evidence in adopting the Ordinance was squarely rejected by the District Court. The District Court stated as follows:

> Plaintiffs make the general objection that the Ordinance cannot be directed to adult cabarets at all, claiming that a "paucity" of evidence concerning such establishments was considered by the City. This is incorrect, as both major studies considered - those from Austin and Indianapolis - concerned topless bars. Moreover, any consideration of the Ordinance and the discussion surrounding it, as a whole, reveals that the City did indeed consider topless bars part of the condition the Ordinance seeks to ameliorate; the City may permissibly include adult cabarets in the Ordinance. *Dumas v. City of Dallas*, 648 F.Supp. at 1076 n.43 (N.D. Tex. 1986).

A number of studies by other cities have shown that topless bars contribute to the secondary effects generated by adult businesses,[40] and the City of Dallas was entitled to rely upon the studies which it "reasonably believed to be relevant to the problem" that it addressed. *City of Renton*, 89 L.Ed.2d at 40. Petitioners arguments are clearly controlled by *City of Renton* and furnish no basis for issuance of a writ of certiorari.

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[40]See, for example, the Houston study mentioned in *SDJ, Inc. v. City of Houston*, 636 F.Supp. at 1364-65 (S.D. Tex. 1986), affirmed at 837 F.2d 1268 (5th Cir. 1988).

CONCLUSION

The decision of the Fifth Circuit Court of Appeals is in harmony with this Court's decisions in *Young, City of Renton* and *Arcara*. This Court should deny the Petition for Writ of Certiorari.

Date: July 12, 1988

Respectfully submitted,

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APPENDIX A

ORDINANCE NO. 19377

An ordinance amending Sections 41A-2, 41A-5, 41A-7, 41A-10, and 41A-13 of CHAPTER 41A, "SEXUALLY ORIENTED BUSINESSES," of the Dallas City Code, as amended; amending definitions; adding definitions of "residential district" and "residential use"; amending provisions dealing with the issuance of licenses for sexually oriented businesses; amending inspection provisions; amending revocation provisions; providing a penalty not to exceed $1,000; providing a saving clause; providing a severability clause; and providing an effective date.

WHEREAS, the city plan commission and the city council, in accordance with the provisions of state law and the applicable ordinances of the city, have given the required notices and have held the required public hearings regarding this amendment to CHAPTER 41A, "SEXUALLY ORIENTED BUSINESSES," of the Dallas City Code, as amended; and

WHEREAS, on June 18, 1986, the city council passed Ordinance No. 19196, which amended the Dallas City Code, as amended, by adding Chapter 41A, "SEXUALLY ORIENTED BUSINESSES"; and

WHEREAS, on August 6, 1986, the city council adopted Resolution No. 86-2453, clarifying certain definitions in Ordinance No. 19196; and

WHEREAS, Section 3 of Resolution No. 86-2453 directed the city attorney to draft an ordinance amending Section 41A-13(a) of the city code in a manner consistent with the intent expressed in Resolution No. 86-2453; and

WHEREAS, the city attorney has drafted this ordinance in accordance with the directive of Resolution No. 86-2453; and

WHEREAS, the city attorney has further advised that enforcement of Ordinance No. 19196 can be enhanced by amending certain of its provisions dealing with issuance and revocation at licenses and inspection provisions relating to sexually oriented businesses; Now, Therefore,

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF DALLAS:

SECTION 1. That Subsection (13) of Section 41A-2, "Definitions," of CHAPTER 41A, "SEXUALLY ORIENTED BUSINESSES," of the Dallas City Code, as amended, is amended to read as follows:

"(13) NUDITY or a STATE OF NUDITY means:

(A) the appearance of a human bare buttock, anus, male genitals, female genitals, or female breast, *or*

(B) a state of dress which fails to opaquely cover a human buttock, anus, male genitals, female genitals, or areola of the female breast."

SECTION 2. That Subsections (15) through (21) of Section 41A-2, "Definitions," of CHAPTER 41A, "SEXUALLY ORIENTED BUSINESSES," of the Dallas City Code, as amended, are hereby renumbered as Subsections (17) through (23) respectively.

SECTION 3. That Section 41A-2, "Definitions," of CHAPTER 41A, "SEXUALLY ORIENTED BUSINESSES," of the Dallas City Code, as amended, is amended by adding new Subsections (15) and (16) to read as follows:

"(15) RESIDENTIAL DISTRICT means a single family, duplex, townhouse, multiple family or mobile home zoning district as defined in the Dallas Development Code.

(16) RESIDENTIAL USE means a single family, duplex, multiple family, or "mobile home park, mobile home subdivision, and campground" use as defined in the Dallas Development Code."

SECTION 4. That Section 41A-5, "Issuance of License," of CHAPTER 41A, "SEXUALLY ORIENTED BUSINESSES," of the Dallas City Code, as amended is amended to read as follows:

"SEC. 41A-5. ISSUANCE OF LICENSE.

(a) The chief of police shall approve the issuance of a license by the assessor and collector of taxes to an applicant within 30 days after receipt of an application unless he finds one or more of the following to be true:

(1) An applicant is under 18 years of age.

(2) An applicant or an applicant's spouse is overdue in his payment to the city of taxes, fees, fines, or penalties assessed against him or imposed upon him in relation to a sexually oriented business.

(3) An applicant has failed to provide information reasonably necessary for issuance of the license or has falsely answered a question or request for information on the application form.

(4) An applicant or an applicant's spouse has been convicted of a violation of a provision of this chapter, other than the offense of operating a sexually oriented business without a license, within two years immediately preceding the application. The fact that a conviction is being appealed shall have no effect.

(5) An applicant is residing with a person who has been denied a license by the city to operate a sexually oriented business within the preceding 12 months, or residing with a person whose license to operate a sexually oriented business has been revoked within the preceding 12 months.

(6) The premises to be used for the sexually oriented business have not been approved by the health department, fire department, and the building official as being in compliance with applicable laws and ordinances.

(7) The license fee required by this chapter has not been paid.

(8) An applicant has been employed in a sexually oriented business in a managerial capacity within the preceding manage a sexually oriented business premises in a peaceful and law-abiding manner, *thus necessitating action by law enforcement officers.*

(9) An applicant or the proposed establishment is in violation of or is not in compliance with Section 41A-7, 41A-12, 41A-13, 41A-15, 41A-16, 41A-17, 41A-18, 41A-19 or 41A-20.

(10) An applicant or an applicant's spouse has been convicted of [~~or is under indictment or misdemeanor information for~~] a crime:

(A) involving:

(i) any of the following offenses as described in Chapter 43 of the Texas Penal Code:

(aa) prostitution;

(bb) promotion of prostitution;

(cc) aggravated promotion of prostitution;

(dd) compelling prostitution;

(ee) obscenity;

(ff) sale, distribution, or display of harmful material to minor;

(gg) sexual performance by a child;

(hh) possession of child pornography;

(ii) any of the following offenses as described in Chapter 21 of the Texas Penal Code:

(aa) public lewdness;

(bb) indecent exposure;

(cc) indecency with a child;

~~[(iii) engaged in organized criminal activity as described in Chapter 71 of the Texas Penal Code;]~~

(iii) ~~[(iv)]~~ sexual assault or aggravated sexual assault as described in Chapter 22 of the Texas Penal Code;

(iv) ~~[(v)]~~ incest, solicitation of a child, or harboring a runaway child as described in Chapter 25 of the Texas Penal Code;

~~[(vi) kidnapping or aggravated kidnapping as described in Chapter 20 of the Texas Penal Code;~~

~~(vii) robbery or aggravated robbery as described in Chapter 29 of the Texas Penal Code;~~

~~(viii) bribery or retaliation as described in Chapter 36 of the Texas Penal Code;~~

~~(ix) a violation of the Texas Controlled Substances Act or Dangerous Drugs Act punishable as a felony, Class A misdemeanor, or Class B misdemeanor;~~] or

(v) [~~(x)~~] criminal attempt, conspiracy, or solicitation to commit any of the foregoing offenses;

(B) for which:

(i) less than two years have elapsed since the date of conviction or the date of release from confinement imposed for the conviction, whichever is the later date, if the conviction is of a misdemeanor offense;

(ii) less than five years have elapsed since the date of conviction or the date of release from confinement for the conviction, whichever is the later date, if the conviction is of a felony offense; or

(iii) less than five years have elapsed since the date of the last conviction or the date of release from confinement for the last conviction, whichever is the later date, if the convictions are of two or more misdemeanor offenses or combination of misdemeanor offenses occurring within any 24-month period.

(b) The fact that a conviction is being appealed shall have no effect on the disqualification of the applicant or applicant's spouse.

(c) An applicant who has been convicted or whose spouse has been convicted of an offense listed in Subsection (a)(10)[~~, for which the required time period has elapsed since the date of conviction or the date of release from confinement imposed for the conviction,~~] may qualify for a sexually oriented business license only *when the time period required by Section 41A-5(a)(10)(B) has elapsed.* [~~if the chief of police determines that the applicant or applicant's spouse is presently fit to operate a sexually oriented business. In determining present fitness under this section, the chief of police shall consider the following factors concerning the applicant or applicant's spouse, whichever had the criminal conviction:~~

~~(1) the extent and nature of his past criminal activity;~~

~~(2) his age at the time of the commission of the crime;~~

~~(3) the amount of time that has elapsed since his last criminal activity;~~

~~(4) his conduct and work activity prior to and following the criminal activity;~~

~~(5) evidence of his rehabilitation or rehabilitative effort while incarcerated or following release; and~~

~~(6) other evidence of his present fitness, including letters of recommendation from prosecution, law enforcement, and correctional officers who prosecuted, arrested, or had custodial responsibility for him; the sheriff and chief of police in the community where he resides; and any other persons in contact with him.~~

~~(d) It is the responsibility of the applicant, to the extent possible, to secure and provide to the chief of police the evidence required to determine present fitness under subsection (c) of this section.~~]

(d) [~~(c)~~] The license, if granted, shall state on its face the name of the person or persons to whom it is granted, the expiration date, and the address of the sexually oriented business. The license shall be posted in a conspicuous place at or near the entrance to the sexually oriented business so that it may be easily read at any time."

SECTION 5. That Section 41A-7, "Inspection," of CHAPTER 41A, "SEXUALLY ORIENTED BUSINESSES," of the Dallas City Code, as amended, is amended by adding a new Subsection (e), to read as follows:

"(c) The provisions of this section do not apply to areas of an adult motel which are currently being rented by a customer for use as a permanent or temporary habitation."

SECTION 6. That Subsections (d) and (e) of Section 41A-10, "Revocation," of CHAPTER 41A, "SEXUALLY ORIENTED BUSINESSES," of the Dallas City Code, as amended, are amended to read as follows:

"(d) Subsection (b)(7) does not apply to adult motels as a ground for revoking the license *unless the licensee or employee knowingly allowed the act of sexual intercourse, sodomy, oral copulation, masturbation, or sexual contact to occur in a public place or within public view.*

(e) When the chief of police revokes a license, the revocation shall continue for one year and the licensee shall not be issued a sexually oriented business license for one year from the date revocation became effective. If, subsequent to revocation, the chief of police finds that the basis for the revocation has been corrected or abated, the applicant may be granted a license if at least 90 days have elapsed since the date the revocation became effective. If the license was revoked under Subsection (b)(5), an applicant may not be granted another license until the appropriate number of years required under Section 41A-5(a)(10)(B) has elapsed [~~since the termination of any sentence, parole, or probation~~]."

SECTION 7. That Subsection (a) of Section 41A-13, "Location of Sexually Oriented Businesses," of CHAPTER 41A, "SEXUALLY ORIENTED BUSINESSES," of the Dallas City Code, as amended, is amended to read as follows:

"(a) A person commits an offense if he operates or causes to be operated a sexually oriented business within 1,000 feet of:

(1) a church;

(2) a public or private elementary or secondary school;

(3) a boundary of a residential district as defined *in this chapter* [~~by the Dallas Development Code~~];

(4) a public park adjacent to a residential district as defined *in this chapter* [~~by the Dallas Development Code~~]; or

(5) the property line of a lot devoted to *a* residential use *as defined in this chapter.*"

SECTION 8. That a person violating a provision of this ordinance, upon conviction, is punishable by a fine not to exceed $1,000.

SECTION 9. That CHAPTER 41A of the Dallas City Code, as amended, shall remain in full force and effect, save and except as amended by this ordinance.

SECTION 10. That the terms and provisions of this ordinance are severable and are governed by Section 1-4 of CHAPTER 1 of the Dallas City Code, as amended.

SECTION 11. That this ordinance shall take effect immediately from and after its passage and publication in accordance with the provisions of the Charter of the City of Dallas, and it is accordingly so ordered.

October 12, 1986